



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 9, 2005

Mr. Mark Anthony Sanchez
Gale, Wilson & Sanchez
115 East Travis, Suite 618
San Antonio, Texas 78205

OR2005-07204

Dear Mr. Sanchez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 231817.

The South San Antonio Independent School District (the "district"), which you represent, received a request for all school records on a named student, as well as other information regarding his classroom and teacher. The requestor also seeks certain district policies and budgetary information. You claim that the submitted information is excepted from disclosure under section 552.102 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note, that the district has not submitted to this office copies or samples of the responsive budgetary information. Thus, we assume that any information maintained by the district that is responsive to this portion of the request has been released to the requestor, to the extent it exists. If not, the district must release such information immediately. *See* Gov't Code §§ 552.006, .301, .302; Open Records Decision No. 664 (2000) (concluding that section 552.221(a) requires that information not excepted from disclosure must be released as soon as possible under the circumstances).

Next, we note that the district has not complied with the procedural requirements of section 552.301 of the Governmental Code. Section 552.301(e) requires the governmental body to submit to the attorney general, not later than the fifteenth business day after the date of its receipt of the request, (1) written comments stating why the governmental body's

claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the written request for information; (3) a signed statement of the date on which the governmental body received the request, or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples of the information if it is voluminous. *See id.* § 552.301(e)(1)(A)-(D). You state you received the request on June 20, 2005. Thus, you were required to submit the responsive information by July 12, 2005. However, you did not submit the responsive information until July 14, 2005. You state that the delay was a result of reduced personnel at the district. However, you have not informed us that the district's offices were closed during this time. Accordingly, the days for which the district had reduced staff working are business days for the purpose of calculating the fifteen business day deadline. Therefore, by submitting the responsive information later than the fifteen business day deadline you have failed to comply with section 552.301(e) of the Government Code.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the information is public and must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally speaking, a compelling reason exists when third party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Because section 552.102 can provide a compelling reason to withhold information, we will address your argument concerning this exception.

Now turning to the submitted information, we note that most of it is subject to the Family Educational Rights and Privacy Act of 1974 ("FERPA"), section 1232g of title 20 of the United States Code. FERPA provides that no federal funds will be made available under any applicable program to an educational agency or institution that releases personally identifiable information, other than directory information, contained in a student's education records to anyone but certain enumerated federal, state, and local officials and institutions, unless otherwise authorized by the student's parent. *See* 20 U.S.C. § 1232g(b)(1); *see also* 34 C.F.R. § 99.3 (defining personally identifiable information). "Education records" are those records that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C. § 1232g(a)(4)(A).

Under FERPA, a student's parents or guardians have an affirmative right of access to their child's education records. 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.3. Thus, the requestor's client, as a parent of the child at issue in the submitted records, has a right of access to those records under FERPA. Section 552.102 is a state statute that is preempted by federal law to the extent that it conflicts with that federal law. *See, e.g., Equal*

Employment Opportunity Comm'n v. City of Orange, 905 F. Supp 381, 382 (E.D. Tex. 1995); *see also* Open Records Decision No. 431 (1985) (information subject to right of access under FERPA may not be withheld pursuant to statutory predecessor to section 552.103). Further, the requestor refers to an "authorization for release" that was enclosed with the request letter. *See* 20 U.S.C. § 1232g(b)(2) (requiring proper written consent for access to student's education records). Thus, you must allow access to this student's education records by the requestor. We note that the requestor's client has another child referenced in the information at issue. Accordingly, this information must be released as well. However, the names of the other district students, which we have marked, must be withheld under FERPA. *See* 20 U.S.C. § 1232g(a)(1)(A); 34 C.F.R. § 99.12(a) (parent's right of access does not extend to information regarding other students); *see also* Open Records Decision Nos. 332 (1982), 206 (1978) (information must be withheld under FERPA only to extent reasonable and necessary to avoid personally identifying particular student).

You claim that the remaining information consists of employment records that are excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. 540 S.W.2d at 685. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

Some of the remaining information relates to the job qualifications of a district employee. Furthermore, the rest of this information consists of work-related documents. Since there is a legitimate public interest in this type of information, we conclude that none of the remaining information may be withheld under common-law privacy. *See* Open Records Decision Nos. 659 at 5 (1999) (listing types of information that attorney general has held to be protected by right to privacy), 470 (1987) (public has legitimate interest in job qualifications and performance of public employees), 455 (1987) (public employee's job performances or abilities generally not protected by privacy), 444 at 5-6 (1986) (public has interest in public employee's qualifications and performance and circumstances of his

resignation or termination), 423 at 2 (1984) (explaining that because of greater legitimate public interest in disclosure of information regarding public employees, employee privacy under section 552.102 is confined to information that reveals “intimate details of a highly personal nature”).

In summary, with the exception of the marked students’ names that must be withheld under FERPA, the district must release the submitted information.¹

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

¹We note that while portions of this information may be excepted from disclosure under laws enacted to protect the privacy of the requestor’s client and her client’s family, the requestor has a special right of access to this information pursuant to section 552.023 of the Government Code. Gov’t Code § 552.023 (person or person’s authorized representative has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person’s privacy interests). Because information to be released under section 552.023 is confidential with respect to the general public, if the district receives a future request for this information from an individual other than this requestor or her authorized representative, the district should again seek our decision.

body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Jaclyn N. Thompson
Assistant Attorney General
Open Records Division

JNT/krl

Ref: ID# 231817

Enc. Submitted documents

c: Judith Sanders-Castro
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(w/o enclosures)